(7) (5)

Nos. 85-1222 and 85-1267

Supreme Court, U.S.
FILED
AUG 1 1986
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL., PETITIONERS

v.

STATE OF TEXAS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

JIM MATTOX
Attorney General
MARY F. KELLER
Executive Assistant Attorney General for Litigation
LARRY J. LAURENT
Special Assistant Attorney General
FERNANDO RODRIGUEZ
Assistant Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548
(512) 475-1101
Counsel for Respondent

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
ROBERT S. BURK
General Counsel
Interstate Commerce Commission
Washington, D.C. 20423
(202) 275-7312
MICHAEL E. ROPER
Missouri-Texas-Kansas Railroad Co.
701 Commerce Street
Dallas, Texas 75202
(214) 651-6741
Counsel for Petitioners

PETITIONS FOR A WRIT OF CERTIORARI FILED JANUARY 21, 1986 (No. 85-1222) AND JANUARY 24, 1986 (No. 85-1267)
CERTIORARI GRANTED JUNE 2, 1986

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1222

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS

No. 85-1267

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL., PETITIONERS

v.

STATE OF TEXAS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

TABLE OF CONTENTS*

	Page
Chronological List of Relevant Docket Entries ...	1
No. 84-4169, U.S.C.A., 5th Cir.	1
No. 84-4386, U.S.C.A., 5th Cir.	4
Application of Missouri-Kansas-Texas R.R. Co. for Exemption from Regulation, Sept. 27, 1982 (Exhibit 2 to Missouri-Kansas-Texas R.R. Co. Petition to the Interstate Commerce Commission under 49 U.S.C. 11501(c), Dec. 19, 1983)	7

---

* The relevant opinions of the court of appeals and the Interstate Commerce Commission are printed in the appendix to the petition for a writ of certiorari in No. 85-1222 and have not been reproduced.

Contents—Continued

	Page
Railroad Commission of Texas Proposal for Decision, Oct. 19, 1983	11
Railroad Commission of Texas Final Order, Dec. 5, 1983	22
Railroad Commission of Texas Proposal for Decision, Jan. 17, 1984	24
Railroad Commission of Texas Final Order, Feb. 28, 1984	35
Orders Granting Certiorari	37
No. 85-1222	37
No. 85-1267	38

503 MG-1112

SUBJECT																		CROSS APPEAL NO.	CASE NUMBER
PRIS A	PRIS A-Out	2255 A	2255 A/Out	SOC SEC	NLRB	P C DIV	P C FED	U S CIV	TAX COURT	BKCY	Oth Agcy Review	CIVIL RIGHTS	TAX D C	SCHOOL	CROSS APPEAL				84-4169
											X								

CIRCUIT 5 APPEAL ____ FROM ____ DISTRICT OF ____ AT TEXAS CASE

DATE DOCKETED 03/19/84 $65 FEE PAID 03/19/84 JUDGE ____

DATE NOTICE OF APPEAL FILED ____

D C DOCKET NUMBER ICC No. 39627 REPORTER ____

STATE OF TEXAS,

Petitioner,

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents.

RECEIVED
JUL 3 12 PM '84
INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL

CONSOLIDATED WITH 84-4386

APPEARANCE FILED—DATE	CODE	ATTORNEYS FOR APPELLANT	ARG
		Jim Mattox, AG, P.O. Box 12548, Capitol Station, Austin, TX 78711 (512) 475-1101	
3/29/84		Justin Scott Wilson, Asst. AG	✓
		open	

APPEARANCE FILED—DATE	CODE	ATTORNEYS FOR APPELLEE	ARG
		John Broadley, General Cnsl., ICC, 12th & Constitution Ave., N.W., Room 5137, Wash., DC 20423	
4/12/84		H. Glenn Scammel, -do- 275-1846	✓
5/1/84	✓	John P. Legendre, [illegible] North Industrial Blvd., Dallas TX 75207 (214/760-3062)	✓
06/19/84		John J. Powers, III, Dept of Just., Rm. 3313, Antitrust Div., Main Bldg., 10th & Pa. Ave.,N.W., Wash.,D.C. 20530 FTS-633-2414)	
06/19/84	X	John P. Fonte -do-	

(1)

(2)

TITLE STATE OF TEXAS v. USA v. ICC

NO. 84-4169

1. RECORD, EXHIBITS AND BRIEF INFORMATION | Filing:

- 4/27/84 — Partial Record or Cert. List
- 10/1/84 — Record on Appeal — No. of Vols. 1 ✓
- _____ — Supp. Record — No. of Vols. _____
- _____ — Second Supp. Record — No. of Vols. _____
- _____ — Third Supp. Record — No. of Vols. _____
- _____ — Exhibits ☐ Env. ☐ Box ☐ Pkg ☐ Roll
- _____ — Exhibits ☐ Env. ☐ Box ☐ Pkg. ☐ Roll
- 7-5-84 — Appendix ☐ (P) ☐ (M)
- _____ — Record Excerpts
- _____ — Supp. Certified List
- _____ — Briefing Notice Issd.
- 7-5-84 — Brief for Appellant — OK - 7/2
- _____ — Brief for Appellant
- _____ — Brief for Appellant
- _____ — Brief for Cr. Appellant
- 9/12/84 — Brief for Appellee
- _____ — Brief for Appellee
- _____ — Brief for Appellee
- _____ — Brief for Cr. Appellee
- NOV 1 1984 — Reply Brief for Appellant
- _____ — Reply Brief for Cr. Appellant
- _____ — Supp. Brief for Appellant
- _____ — Supp. Brief for Appellee
- 09-28-84 — Brief for Amicus/Intervenor (Missouri-Kansas, etc.)
- _____ — Rule 28(j) letter—Appellant
- 11-19-84 — Rule 28(j) letter—Appellee (J)
- 6/27/85 — " " " (J)
- 9.12.85 — " " Appellant (J)

MISCELLANEOUS FILINGS | Filing:

- _____ — Dup. Notice of Appeal and Clerk's Statement of Docket Entries
- _____ — Papers Trans. from Misc. No.
- _____ — Order of DC Granting Appeal IFP
- _____ — Order of DC Appointing Counsel
- _____ — Affidavit of Financial Status
- _____ — CJA 20 Issd./Voucher Recd.

AGENCY REVIEW CASES | Filing:

- 03/19/84 — Petition for Review of Order ( ) of ☐ NLRB ☐ FERC XX ICC ☐
- _____ — Application for Enforcement—NLRB
- _____ — Answer to Application for Enforcement
- _____ — Cross Application for Enforcement

4. EXTENSION Fig. Motion for: | Order Fld. | Ext. to:

- _____ — Transcript
- _____ — Transcript
- _____ — Transcript
- 5/23/84 — Appellant's Brief (GR) — 6/21/84
- 6/18/84 — Appellant's Brief — 7/2/84
- _____ — Appellant's Brief
- 8/1/84 — Appellee's Brief — 9/5/84
- 9/5/84 — Appellee's Brief — 9/10/84 NC
- _____ — Appellee's Brief
- 10/11/84 — Reply Brief — 10/22/84
- 10/22/84 — 10/29/84

5. CALENDAR INFORMATION Week of 2-4-85

- Special Panel _____
- Summary Panel: _____
- 12-26-84 — Case Assigned for 2-6-85 in ☐ EB ☑ W ☐ E ☐ _____
- _____ — Case Cont'd for Reassignment _____
- _____ — Case Reassigned for _____ in ☐ EB ☐ W ☐ E ☐
- Hearing Panel: RGG - HAP - WED
- 2-6-85 — Case Argued ☑ by Appellant ☑ by Appellee
- _____ — Case Sub. w/o Arg. ☐ by Appellant ☐ by Appellee

6. OPINION INFORMATION ✓

- 9/6/85 — Opinion Rendered — Also fld in 84-4386 (Issd 9/12)
- ☐ Affirmed ☐
- HAP — Reversed
- ☐ Affd. in Pt. ☐ P.C. ☐ Conc. Spec.
- ☐ Vacated XX Signed ☐ Dis.
- ☐ Dismissed ☐ Rule 21 ☐ Dis. in Pt.
- _____ — Opinion Withdrawn

7. REHEARING INFORMATION

- 9/25/85 (J) — Mot. for Ext.—Ext. to: — See SN 9/12 — 10/26/85 Rqst Ext
- _____ — Mot. for Ext.—Ext. to:
- OCT 25 1985 — Petition for Rehearing (J)
  ☐ Appellant ☐ Appellee ☑ Reg. ☐ En Banc
- 10-28-85 — Petition for Rehearing (J) (USA + ICC) also fld 84-4386
  ☐ Appellant ☑ Appellee ☐ Reg. ☑ En Banc
- _____ — Response of
- NOV 15 1985 — Order Denying Rehearing w/o pull
  ☐ Dissenting
- _____ — ☐ Opinion S9
- _____ — ☐ Order on Petition for Rehearing S9

BEST AVAILABLE COPY

BEST AVAILABLE COPY

84-4169

(3)

8. MOTIONS

Filing Motion to or for	Response Filed By	Date	Granted	Denied	By Court	By Clerk	Date
Mandamus							
Reinstate Appeal							
Stay Further Proceedings in CA							
Stay Pending Appeal							
Injunction Pending Appeal							
Consolidate Appeals W/							
Leave to Appeal IFP							
Bail Pending Appeal							
Withdraw as Counsel							
Appointment of Counsel							
Supplement Record							
Expedite							
File Brief in Excess Pgs							
File Brief in Excess Pgs.							
Dismiss by Appellant							
Dismiss by Appellee							
Amicus Curiae							
File Supp. Brief							
1-22-85 Stay of Mandate			HAP ✓		✓		11-27-85
1-22-86 Recall of Mandate	-Dkt. 1/23/86 (HAP)		✓			✓	3-21-86 HAP
Intervene	MPRR Co.		✓			✓	4/9/84
Intervene							
File Reply Br. out of time							

9. OTHER DOCKET ENTRIES

4/10/84	Flg. Motion for leave to intervene MPRR Co. (GRANTED 4/17/84 GB)
"	Flg. Motion for leave to intervene SPTCo. (GRANTED 4/17/84 GB)
4/25/84	Flg. Certificate of alignment of Intervenor, PT Co.
10/4/84	Flg. Unopposed motion of respondents to consolidate cases for oral argument and to adopt respondents' joint brief in 84-4169 as their brief in 84-4386. (GRANTED 10/4/84 GB)
1/22/85	Flg. Unopposed motion of Intervenors for additional time for oral argument. (Not to exceed 1/23/85)
1/28/85	Flg. Order GRANTING motion of intervenors for enlargement of time for respondent's oral argument from 20 to 25 minutes . HAP
1/28/85	Flg. ICC's letter dtd 1/24/85 with opinions attached. (CE).
10/30/85	Flg. letter of respondent, ICC&U.S.A. dtd. 10/29/85 enclosing a copy of page 5 of petition for rehearing en banc to be substituted for page 5 of the petition. (JT)

10. JUDGMENT OR MANDATE INFORMATION

1-23-85	Bill of Costs ✓
	Flg. & Entg. Judgment
	Issg. Copy of Jdgt. to Bd & Cnsl.
	Mandate Stayed to 1-21-86
01/22/86	Jdgt. as Mdt. Issd. to Clerk
	Jdgt. as Mdt. Reissd. to Clerk
	Dismissal Issd. to Clerk
01/22/86	Record on Appeal Retd. to Clerk - 1 volume
	Exhibits Retd. to Clerk

11. SUPREME COURT INFORMATION 85-1222

	Notice of Appeal to S.C.
	Preparing Proceedings on Certiorari
	Preparing Supp. Proceedings on Cert. 1-17
	Transmitting Orig. Exhibits to S.C.
	Order of S.C.—Ext. to
1-30-86	Notice of Flg. of Cert. Pet. on 1/21/86
6/5/86	Order of S.C. ☐ Denied ☑ Granted 6/24/86
	Notice of Denial of Pet. for Rehearing
	Opinion of S.C. dated
	Judgment of S.C.

3

303 MR 111 (2)

SUBJECT																		CROSS APPEAL NO.	CASE NUMBER
CRIM	PRIS w/	PRIS w/out	2255 w/	2255 w/out	SOC SEC	NLRB	P C DIV	P C FED	U S CIV	TAX COURT	BKCY	Oth Agcy Review	CIVIL RIGHTS	TAX D C	SCHOOL	CROSS APPEAL			84-4386
												XX							

CIRCUIT 5 APPEAL ____ FROM ____ DISTRICT OF ____ AT TEXAS CASE

DATE DOCKETED 06/11/84 $65 FEE PAID in C.A. JUDGE -------

DATE NOTICE OF APPEAL FILED --------

D C DOCKET NUMBER ICC NO. 39704 REPORTER -----

3

STATE OF TEXAS,

Petitioner,

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

CONSOLIDATED WITH 84-4169

Respondents.

APPEARANCE FILED—DATE	CODE	ATTORNEYS FOR APPELLANT	ARG
		Jim Mattox, AG, P.O. Box 12548-Capitol Station, Austin	
6/27/84	..	Justin Scott Wilson, -do- TX, 78711 (512) 475-1101	✓

OPEN

APPEARANCE FILED—DATE	CODE	ATTORNEYS FOR APPELLEE	ARG
		John Broadley, Gen. Cnsl., ICC, 12th & Constitution	
10/10/84	✓	H. Glenn Scammel -do- Ave., N.W., Room 5137 Washington, D.C., (202/275-1846) 20423	✓
		Wm. F. Smith, AG, U.S.D.O.J., 10th & PA Ave., N.W.,	
7/27/84		John J. Powers,III, Rm. 3313, Washington, D.C., 20530	
7/27/84	X	John P. Fonte -do- (for Intervenor-RRTC)	
7/18/84		Keith G. O'Brien, 1729 H St. N.W., Wash. D. C. 20006	
7/18/84	X	Edward [illegible] Wheeler, -do- (202) 337-6500	
5/1/84		John P. Legendre, 505 No. Industrial Blvd. Dallas, TX 75207 214-760-3062	✓

4

(5)

TITLE: STATE OF TX -vs- USA & ICC.

No. 84-4386

1. RECORD, EXHIBITS AND BRIEF INFORMATION	Filing:
DEC 13 1984 Partial Record or Cert. List	
10/25/84 Record on Appeal	No. of Vols. 1 ✓
Supp. Record	No. of Vols.
Second Supp. Record	No. of Vols.
Third Supp. Record	No. of Vols.
Exhibits ☐ Env. ☐ Box ☐ Pkg. ☐ Roll	
Exhibits ☐ Env. ☐ Box ☐ Pkg. ☐ Roll	
Appendix ☐ (P) ☐ (M)	
9-6-84 Record Excerpts	
Supp. Certified List	
Briefing Notice Issd. 7/23/84	
9-6-84 Brief for Appellant	
Brief for Appellant	
Brief for Appellant	
Brief for Cr. Appellant	
Brief for Appellee	
Brief for Appellee	
Brief for Appellee	
NOV 1 1984 Brief for Cr. Appellee	
Reply Brief for Appellant	
Reply Brief for Cr. Appellant	
Supp. Brief for Appellant	
Supp. Brief for Appellee	
Brief for Amicus	
10-4-84 Intervenor (RRTC)	
Rule 28(j) letter—Appellant	
11-19-84 Rule 28(j) letter—Appellee (J)	
" " " Appellant (J)	

4. EXTENSION Flg. Motion for:	Order Fld.	Ext. to:
Transcript		
Transcript		
Transcript		
Appellant's Brief		
Appellant's Brief		
Appellant's Brief		
Appellee's Brief		
Appellee's Brief		
Appellee's Brief		
10/11/84 Reply Brief		10/22/84
10/22/84		10/29/84

5. CALENDAR INFORMATION Week of 2-4-85

Special Panel

Summary Panel:

12-28-84 Case Assigned for 2-6-85 in ☐ EB ☒ W ☐ E ☐

Case Cont'd for Reassignment

Case Reassigned for in ☐ EB ☐ W ☐ E ☐

Hearing Panel: RGG-HAP-WED

2-6-86 Case Argued ☒ by Appellant ☒ by Appellee

Case Sub. w/o Arg. ☐ by Appellant ☐ by Appellee

6. OPINION INFORMATION

9/6/85 Opinion Rendered (Also fld in 84-4169 (sold 9/12/85))

	Affirmed				
HAP	Reversed				
	Affd. in Pt.		P.C.		Conc. Spec.
	Vacated	XX	Signed		Dis.
	Dismissed		Rule 21		Dis. in Pt.

Opinion Withdrawn

MISCELLANEOUS FILINGS	Filing:
Dup. Notice of Appeal and Clerk's Statement of Docket Entries	
Papers Trans. from Misc. No.	
Order of DC Granting Appeal IFP	
Order of DC Appointing Counsel	
Affidavit of Financial Status	
CJA 20 Issd./Voucher Recd.	

AGENCY REVIEW CASES	Filing:
06/11/84 Petition for Review of Order ( ) of ☐ NLRB ☐ FERC ☒ ICC ☐	
Application for Enforcement—NLRB	
Answer to Application for Enforcement	
Cross Application for Enforcement	

7. REHEARING INFORMATION See SN 9/17

9/25/85 Mot. for Ext.—Ext. to: 10/26/85 (Rep)

Mot. for Ext.—Ext. to:

10-28-85 Petition for Rehearing (J)(U.S.A.+ICC) 84-4116

☐ Appellant ☒ Appellee ☐ Reg. ☒ En Banc

Petition for Rehearing

☐ Appellant ☐ Appellee ☐ Reg. ☐ En Banc

Response of

NOV 15 1985 Order Denying Rehearing W/O Poll

☐ Dissenting

☐ Opinion S9

☐ Order on Petition for Rehearing S9

5

84-4386

	Response Filed By	Date	Granted	Denied	By Court	By Clerk	Date
Mandamus							
Reinstate Appeal							
Stay Further Proceedings in CA							
Stay Pending Appeal							
Injunction Pending Appeal							
Consolidate Appeals W/							
Leave to Appeal IFP							
Bail Pending Appeal							
Withdraw as Counsel							
Appointment of Counsel							
Supplement Record							
Expedite							
File Brief in Excess Pgs.							
File Brief in Excess Pgs							
Dismiss by Appellant							
Dismiss by Appellee							
Amicus Curiae							
File Supp. Brief							
11-23-85 Stay of Mandate			HAP		✓		11-27-85
12-3-85 Recall of Mandate	Appl. 1/28/86 (LAF)		✓				2/3/86
6-25-84 Intervene (RRTC)					✓		9/6/84
Intervene							
File Reply Br. out of time							

9. OTHER DOCKET ENTRIES

7/13/84	Flg. Certificate of alignment of intervenor.
10/4/84	Flg. Unopposed motion of respondents to consolidate cases for oral argument and to adopt respondents' joint brief in 84-4169 as their brief in 84-4386. (GRANTED 10/4/84 GB)
1/22/85	Flg. Unopposed motion of Intervenors in 84-4169 for additional time for oral argument. (Set 1/28/85)
1/28/85	Flg. Order GRANTING motion of intervenors in 84-4169 for enlargement of time for respondent's oral argument from 20 to 25 minutes HAP
1/28/85	Flg. ICC's letter dtd 1/24/85 with opinions attached. (CE)

10. JUDGMENT OR MANDATE INFORMATION

7-23-85	Bill of Costs ✓
	Flg. & Entg. Judgment
	Issd. Copy of Jdgt. to Bd & Cnsl
	Mandate Stayed to 1-21-86
01/22/86	Jdgt. as Mdt. Issd. to Clerk
	Jdgt. as Mdt. Reissd. to Clerk
	Dismissal Issd. to Clerk
01/22/86	Record on Appeal Retd. to Clerk - 1 volume
	Exhibits Retd. to Clerk

11. SUPREME COURT INFORMATION 85-1222

	Notice of Appeal to S.C.
	Preparing Proceedings on Certioran
	Preparing Supp. Proceedings on Cert.
	Transmitting Orig. Exhibits to S.C.
	Order of S.C.—Ext. to
1-30-86	Notice of Flg. of Cert. Pet. on 1/21/86
6/5/86	Order of S.C. ☐ Denied ☒ Granted 6/2/86
	Notice of Denial of Pet. for Rehearing
	Opinion of S.C. dated
	Judgment of S.C.

BEST AVAILABLE COPY

BEFORE THE
RAILROAD COMMISSION OF TEXAS

Docket No. 000149RRMI

EXEMPTION OF TEXAS INTRASTATE TRAILER ON FLATCAR (TOFC) AND CONTAINER ON FLATCAR (COFC) SERVICE FROM REGULATION

APPLICATION OF MISSOURI-KANSAS-TEXAS RAILROAD COMPANY FOR AN EXEMPTION FROM REGULATION

MICHAEL E. ROPER
Attorney for Applicant
MISSOURI-KANSAS-TEXAS
RAILROAD COMPANY
701 Commerce Street
Dallas, TX 75202
(214) 651-6741

Dated: September 17, 1982

BEFORE THE
RAILROAD COMMISSION OF TEXAS

Docket No. 000149RRMI

EXEMPTION OF TEXAS INTRASTATE TRAILER ON FLATCAR (TOFC) AND CONTAINER ON FLATCAR (COFC) SERVICE FROM REGULATION

APPLICATION OF
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
FOR AN EXEMPTION FROM REGULATION

This application is filed by Missouri-Kansas-Texas Railroad Company (MKT) under Rule RCT 051.03.30.011(b) and seeks an exemption from rail carrier regulation for Trailer on Flatcar (TOFC) and Container on Flatcar (COFC) traffic moving intrastate in the State of Texas. The scope of the exemption sought is the same as was granted by the Interstate Commerce Commission in Ex Parte No. 230 (Sub-No. 5), *Improvement of TOFC/COFC Regulation*, served February 19, 1981, as clarified on June 17, 1981, and June 21, 1982 (365 ICC 728).

The Applicable Standard for Consideration of the Exemption

It is clear that this Commission in determining whether to grant the exemption sought herein must apply the standards set forth in 49 USC 10505. See Ex Parte No. 388, *State Intrastate Rail Rate Authority*, 365 ICC 855 (1982). Those standards provide that this Commission shall exempt a person, class of persons, or a transaction or service upon a finding that regulation is not necessary to carry out the transportation policy of 49 USC 10101a, and

either the transaction or service is of limited scope or regulation is not needed to protect shippers from an abuse of market power.

This Commission's rules are somewhat at variance with the applicable standard which must be applied. For example, RCT 051.03.30.011(a) provides that the Commission *may* exempt if rate regulation is not necessary to carry out the policy of the Commission. Under the applicable standard discussion above, this Commission must grant an exemption if continued regulation is not necessary to carry out the transportation policy as set out in 49 USC 10101a and if either of the two conditions discussed above is met.

Texas Intrastate TOFC/COFC Service Meets the Requirements for Exemption

MKT believes that the Commission must grant an exemption for Texas intrastate TOFC/COFC service. Continued regulation of this service is not necessary to carry out the transportation policy of 49 USC 10101a. In fact, continued regulation is directly contrary to that policy in that it inhibits the fostering of sound economic conditions in transportation and the ensuring of effective competition between rail carriers and other modes. Also, an exemption from regulation would further the transportation policy by helping the development and continuation of a sound rail system with effective competition.

An exemption of Texas intrastate TOFC/COFC service is of limited scope and is of such a nature that continued regulation is not necessary to protect shippers from an abuse of market power. The Commission is well aware of the keen competition between rail carriers and motor carriers for Texas intrastate traffic. The existence of such competition protects shippers from any potential abuses of market power by the rail carriers with regard to intrastate TOFC/COFC service in Texas. The small amount

of TOFC/COFC traffic moving intrastate in Texas shows conclusively that such an exemption would be of limited scope.

Finally, there is no reason to regulate Texas intrastate TOFC/COFC traffic while Texas interstate TOFC/COFC traffic is exempt from regulation. A TOFC/COFC movement should be treated the same regardless of whether it moves interstate or intrastate. The same reasons for exempting interstate TOFC/COFC traffic, as found by the Interstate Commerce Commission, also apply to intrastate TOFC/COFC traffic in Texas. It is an anomalous situation to regulate one and not the other. There simply is no reason for a disparity in treatment.

MKT therefore respectfully requests the Commission to issue appropriate notices for this application for an exemption and to grant an exemption from regulation for all TOFC/COFC traffic moving intrastate in Texas.

Respectfully submitted,

MISSOURI-KANSAS-TEXAS
RAILROAD COMPANY

/s/ MICHAEL E. ROPER

Michael E. Roper
701 Commerce Street
Dallas, TX 75202
(214) 651-6741

RAILROAD COMMISSION OF TEXAS
TRANSPORTATION DIVISION

Docket No. 000149RRMI
NOTICE NO. 7989
DATE ISSUED: October 19, 1983

APPLICATION OF
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
TRAILER ON FLATCAR (TOFC) AND CONTAINER ON
FLATCAR (COFC), TEXAS RAIL INTRASTATE–
EXEMPT FROM REGULATION

PROPOSAL FOR DECISION

HOLLY C. NOELKE
PRESIDING EXAMINER

STATEMENT OF THE CASE

This case involves the application of Missouri-Kansas-Texas Railroad Company (MKT) to exempt from regulation intrastate trailer on flatcar (TOFC) and container on flatcar (COFC) traffic to the extent that it is exempted by the Interstate Commerce Commission. Six railroads, the Texas Industrial Traffic League, and three shippers appeared in support of the exemption. No railroads or shippers appeared in opposition to the exemptions. The only opposition to the application was lodged by the Common Carrier Motor Freight Association.

The examiner has concluded that, under the relevant statutory authority, TOFC/COFC service should be exempted from intrastate regulation. The examiner does not

recommend exemption of either motor carrier service conducted in connection with TOFC/COFC service or of service performed by roadrailer vehicles.

Parties of Record

For the Applicant:	Applicant
Michael E. Roper	Missouri-Kansas-Texas Railroad Company
For the Intervenors in Support:	Intervenors in Support:
Virgil O. Musick	Texas Industrial Traffic League
Hugh L. McCulley	Southern Pacific Transportation Company
John P. Legendre	Missouri Pacific Railroad Company
Robert B. Burns	Atchison, Topeka, and Santa Fe Railway Company
Donald L. Turkal	Burlington Northern Railroad Company Fort Worth and Denver Railway Company
For the Intervenors in Opposition: Ed Ward	Intervenors in Opposition: Common Carrier Motor Freight Association

Nature of the Case

The applicant in the instant proceeding seeks to exempt trailer on flatcar and container on flatcar traffic from intrastate regulation in the state of Texas to the extent that it has been exempted in interstate commerce by the Interstate Commerce Commission.

Procedural History of the Case

Date Filed: September 27, 1982

Published in Notice No. 7989

Date Heard: December 2, 1982

Current Status: Protested

FINDINGS OF FACT

After a review of the record as a whole, the examiner has determined that the following findings of fact are supported by substantial evidence:

1. The Missouri-Kansas-Texas Railroad Company (MKT) filed an application with the Railroad Commission of Texas (RCT) to exempt from regulation the transportation of trailer on flatcar (TOFC) and container on flatcar (COFC) traffic moving in Texas intrastate commerce to the same extent as interstate TOFC/COFC traffic has been exempted by the Interstate Commerce Commission (ICC). (Application)

2. The following entities filed interventions and testified in support of the application: Southern Pacific Transportation Company (SP), Atchison, Topeka and Santa Fe (AT & SF), Missouri Pacific Railroad Company (MP), Burlington Northern Railroad Company (BN), the Fort Worth and Denver Railroad Company (FW & D), and the Texas Industrial Traffic League (TITL). The TITL is an organization representing over 100 Texas shippers and/or receivers. (Tr. 4-5, 75)

3. The only entity which expressed opposition to the application was the Common Carrier Motor Freight Association (CCMFA). (Ex. 3, and Statement of Position filed by CCMFA, Dated December 14, 1982)

4. The MKT averaged, at the time of hearing, ninety-two TOFC/COFC shipments per month in Texas intrastate commerce and anticipated doubling this traffic within three years if the exemption is granted. The SP handled fewer shipments than the MKT and at that time the other intervening railroads handled no Texas intrastate TOFC/COFC traffic. (Tr. 21-22, 33, 91, 129, 136, 142)

5. The modes of transportation which are major competitors with TOFC/COFC are private motor carriage, regulated motor carriers which utilize dry vans, and rail boxcars. (Tr. 22-23, 123)

6. The MKT, SP, AT & SF, MP, BN, and FW & D have TOFC/COFC facilities at limited points on their lines and intend to participate in the movements of Texas intrastate TOFC/COFC traffic if the exemption is granted. (Tr. 35, 82, 134, 138, 145, 146)

7. A concentration of market power is unlikely because of the constraints inherent in rail transportation which do not allow movement of time sensitive traffic, the movement of shipments to points off the rail lines, and the complete pickup, delivery, and linehaul service performed by motor carriers. (Tr. 22, 33, 54, 73, 122)

8. The Texas intrastate TOFC/COFC rates charged by each rail carrier are currently published in tariffs filed with the RCT. Any amendments to the tariffs must be filed with the RCT at least ten days (for reductions) or twenty days (for increases) before the rates can become effective. (Tr. 19, 20, 39)

9. The ICC has exempted from regulation interstate TOFC/COFC traffic, which allows the carriers to charge rates without filing them with the ICC. (Tr. 32; Ex.2)

10. If TOFC/COFC traffic were exempt in Texas, rail carriers would have flexibility in setting rates and be able to negotiate rates with the shippers without the prior filing of rates with the RCT. In negotiating rates with the shippers, the carriers include such factors as the commodity,

the distance, the points of origin and destination, the volume tendered and the availability of equipment. (Tr. 108-109, 128-129, 131, 144-145)

11. The limited current tender of Texas intrastate TOFC/COFC inhibits the carriers' ability to fill their flatbed equipment with two trailers or containers, to obtain backhauls, to optimize the use of their equipment, and to create priority service TOFC/COFC trains. (Tr. 27, 34, 139, 146).

DISCUSSION

The Missouri-Kansas-Texas Railroad Company (MKT) filed an application with the Railroad Commission of Texas (RCT) to exempt from regulation the transportation of trailer on flatcar (TOFC) and container on flatcar (COFC) traffic moving in Texas intrastate commerce to the same extent as interstate TOFC/COFC service has been exempted by the Interstate Commerce Commission (ICC). The Southern Pacific Transportation Company (SP), the Atchison, Topeka, and Santa Fe Railway Company (AT & SF), the Missouri Pacific Railway Company (MP), the Burlington Northern Railroad Company (BN), the Fort Worth and Denver Railroad Company (FW &D), and the Texas Industrial Traffic League (TITL) filed interventions in support of the application, and testified in support of the exemption. Opposition to the application was lodged by the Common Carrier Motor Freight Association (CCMFA), which intervened and filed a statement of position in opposition to the application.

Scope of Application

This application does not involve service by the railroads on vehicles known as "roadrailers". The exemption of roadrailer service is being addressed in a separate application pending before the RCT, under Docket No. 025806ZZR.

In addition, this proceeding does not involve the exemption of trucking operations performed by the railroads in connection with TOFC/COFC service. The issue before the RCT is whether TOFC/COFC service is to be exempted. TOFC/COFC service is transportation on a *rail car* of freight laden trucks, trailers, semi-trailers, or their container portions, or empty trucks, trailers, semi-trailers, or their container portions when they are moving incidental to prior or subsequent use in TOFC/COFC service.

In its decision in Ex Parte 230, the ICC addressed the exemption of both TOFC/COFC service *and* trucking operations conducted by the railroads in connection with TOFC/COFC service. The instant application filed with the RCT is limited to the exemption of intrastate TOFC/COFC service itself. The public is not on notice that related trucking operation exemptions would be addressed in this proceeding. Furthermore, even if, arguendo, the notice problem were absent, the applicant did not present evidence of the scope of such trucking operations or evidence relating to whether rate regulation is necessary to protect shippers from the abuse of market power relative to any exemption of trucking operations performed by the railroads in connection with TOFC/COFC service.

In fact, the railroads testified, as the basis for the proposed exemption of the rail movements, that TOFC/COFC traffic is limited, and therefore, not susceptible to a concentration of market power because rail transportation does not allow the movement of shipments to points off the rail lines and complete pickup and delivery and linehaul service performed by motor carriers. If both the ground and rail movements were exempt then the railroads would be at a competitive advantage over the regulated intrastate motor carrier service.

The applicant may, of course, file an application to exempt railroad trucking operations performed in connection with TOFC/COFC operations, providing it can show jurisdiction under 40 U.S. Code ¢10505 [sic] to exempt such service. This issue is not reached by the examiner herein.

Exemption of TOFC/COFC Service

TOFC/COFC traffic is currently exempt from regulation when moving interstate. This allows rail carriers the flexibility to compete with other modes of transportation and with each other by rapidly negotiating rates with the shippers without the delay inherent in filing the rates with the ICC. This is contrasted with Texas intrastate movements where the railroads are required to file all rates and rate changes with the RCT before rates can be effective. This results in a delay of at least ten days before the Texas intrastate rates can go into effect. The other modes of transportation which are major competitors of TOFC/COFC are private motor carriage, regulated motor carriers which utilize dry vans, and rail box cars.

Rail transportation, including TOFC/COFC, is subject to certain inherent constraints. The rail carriers cannot provide the rapid movement that the motor carriers are able to provide, nor can they serve points off the rail lines or points which do not have the facilities to accommodate TOFC/COFC traffic. Furthermore, the rail carriers cannot provide the complete pickup, linehaul, and delivery service provided by the motor carriers. The traffic which is susceptible to TOFC/COFC service is therefore limited.

To the extent that shipments are susceptible to TOFC/COFC service, the railroads must provide a cost incentive to shippers for using TOFC/COFC instead of motor carrier service, since the rail carriers cannot compete with the service of the motor carriers.

The rail carriers consider the following criteria in negotiating rates with shippers: the commodity to be moved, the distance, the points of origin and destination,

the volume tendered and the availability of equipment. In order to optimize their operations, the railroads need adequate traffic to load two trailers or containers on each flatcar, and to provide a backhaul for the containers and/or trailers. If enough TOFC/COFC traffic were tendered to the rail carriers, they would be able to create priority service TOFC/COFC trains which would enhance their service to the shippers.

The six railroads which participated in this hearing have facilities to handle TOFC/COFC traffic at limited points on their lines. The carrier currently transport TOFC/COFC shipments interstate. Only the MKT and the SP are currently transporting any Texas intrastate TOFC/COFC traffic. If the exemption were granted, all six carriers would participate in this service, but none anticipate a great diversion of traffic from motor carriers.

In Ex Parte No. 230 (Sub-No. 5) decided by the ICC on February 19, 1981, the ICC concluded that the TOFC/COFC traffic was highly competitive with motor carrier service, that intramodal rail competition was active, and that service problems were an impediment to successful marketing of TOFC/COFC service. The same conclusion may be reached with respect to intrastate trailer on flatcar and container on flatcar traffic, based n [*sic*] the record in the instant proceeding.

Truck service performed by motor carriers will continue to be regulated by the RCT. This will have minimal impact on the railroads, because, as pointed out in testimony by the railroads, virtually all of the various TOFC/COFC plans used by shippers involving prior or subsequent movements by truck are within RCT established commercial zones and as such are already exempt from RCT jurisdiction.

CONCLUSIONS OF LAW

Applicable Law

The instant proceeding is governed by the provisions of 49 U.S. Code §§ 10505 and 10101a. These sections provide, in pertinent part, that:

> "(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under the subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle (1) is not necessary to carry out the transportatin policy of section 10101a of this title; and (2) either (a) the transaction or service is of limited scope, or (b) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power." [§ 10505]
>
> "In regulating the railroad industry, it is the policy of the United States Government (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required; (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission; (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the need of the public and the national defense; (5) to foster sound economic conditions in transportation and to ensure effective competition among rail carriers with other modes, to meet the needs of the

public and the national defense; (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital; (7) to reduce regulatory barriers to entry into and exit from the industry; (8) to operate transportation facilities and equipment without detriment to the public health and safety; (9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle; (10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation; (11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability; (12) to encourage fair wages and safe and suitable working conditions in the railroad industry; (13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination; (14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and to encourage and promote energy conservation." [§ 10101a]

Applicable Rules

This case is also governed by the provisions of 16 TAC § 5.561 (RCT 051.03.30.011) of the Special Rules of Practice and Procedure in Rail Rate Cases. This rule provides, in pertinent part, that:

"The Commission may exempt a transaction or service when the Commission finds that rate regulation is not necessary to carry out the policy of the Com-

mission; and either: (1) the transaction or service is of limited scope or (2) rate regulation is not needed to protect shippers from the abuse of market power."

Conclusion

The examiner concludes that the regulations and rules currently applicable on TOFC/COFC traffic are not necessary to carry out either national transportation policies or RCT transportation policies; that the service is of limited scope; and, that the regulation of Texas intrastate TOFC/COFC traffic is not necessary to protect shippers from the abuse of market power.

RECOMMENDATION

The examiner therefore recommends that the Commission grant the exemption of Texas intrastate TOFC/COFC traffic.

/s/HOLLY C. NOELKE
Holly C. Noelke
Presiding Examiner

HCN/g

RAILROAD COMMISSION OF TEXAS
TRANSPORTATION DIVISION

DOCKET NO. 000149RRMI

RAILROAD FREIGHT CIRCULAR NO. 35710

TRAILER ON FLATCAR (TOFC) AND CONTAINER ON FLATCAR (COFC), TEXAS RAIL INTRASTATE–EXEMPT FROM REGULATION

Date Issued: December 5, 1983

FINAL ORDER

In conference at its office in Austin, Texas, the Railroad Commission of Texas finds that after statutory notice was given to the public and to all interested parties, the above-styled cause was heard by an examiner who made and filed a proposal for decision containing the examiner's findings of fact and conclusions of law. This proposal for decision was properly served and all parties were given an opportunity to file exceptions and replies as part of the record herein, under the provisions of 16 TAC § 5.443 (RCT 051.03.50.043).

The Commission, after review and due consideration of the proposal for decision, the findings of fact and conclusions of law contained therein, hereby adopts as its own the findings of fact and conclusions of law contained in the proposal for decision and incorporates said findings of fact and conclusions of law as if fully set out and separately stated herein.

The Commission concludes that the application of Missouri-Kansas-Texas Railroad Company is reasonable as modified and should be approved.

Accordingly, it is ordered by the Railroad Commission of Texas that, Trailer on Flatcar (TOFC) and Container on Flatcar (COFC) rail traffic moving intrastate in the State of Texas be, and the same is hereby exempted from regulation by the Railroad Commission of Texas. (This exemption shall not apply to incidental pre-rail and ex-rail over-the-road movements.)

RAILROAD COMMISSION OF TEXAS

Effective December 20, 1983.

Chairman

[signed] BUDDY TEMPLE
Commissioner

Attest:

/s/ LOLA WILSON
Secretary

[signed] JIM NUGENT
Commissioner

HDN/g

RAILROAD COMMISSION OF TEXAS
TRANSPORTATION DIVISION

Docket No. 025806ZZR
NOTICE NO. 8006
DATE ISSUED: January 17, 1984

APPLICATION OF
ROAD-RAIL TRANSPORTATION CO. INC.; USE OF
ROADRAILER EQUIPMENT IN INTERMODAL OPERATIONS
INTRASTATE BETWEEN HOUSTON AND DALLAS-FT. WORTH
VIA ROAD-RAIL TRANSPORTATION COMPANY, INC.—
EXEMPT RAIL SERVICE FROM REGULATION.

PROPOSAL FOR DECISION

JIM B. CLOUDT
PRESIDING EXAMINER

STATEMENT OF THE CASE

Summary

This case involves the application of Road-Rail Transportation Company, Inc. to exempt from regulation intrastate transportation service in Road-Rail equipment between Houston and Dallas-Ft. Worth. There were no appearances in support or opposition to the exemption.

The Examiner has concluded that, under the relevant, statutory authority, rail service in Road-Rail equipment should be exempted from intrastate regulation. The examiner does not recommend exemption of motor carrier service conducted in Road-Rail equipment.

Parties of Record

For the Applicant:	Applicant:
Keith G. O'Brien	Road-Rail Transportation
Henry A. Fahl	Co., Inc.

Nature of the Case

The petitioner in this proceeding seeks the use of Roadrailer equipment in intermodal operations intrastate between Houston and Dallas-Ft. Worth via Road-Rail Transportation Company, Inc. – Exempt rail service from regulation.

Procedural History of the Case

Date Filed:	May 16, 1983
Published in Notice No.	8006
Date Heard:	August 10, 1983
Hearing Exhibits Received:	November 14, 1983
Current Status:	Unprotested

All motions and objections not heretofore disposed of are hereby overruled or denied. All persons or entities by which protests or interventions in opposition were filed but which did not appear at the hearing are hereby stricken as parties to this proceeding.

FINDINGS OF FACT

After due consideration of the record as a whole, the hearings examiner has determined that the following findings of fact are supported by substantial evidence:

1. Road-Rail Transportation, Inc. (Road-Rail) filed an application with the Railroad Commission of Texas (RCT) to exempt from regulation transportation service in Road-Rail equipment (Roadrailers) between Dallas and Ft. Worth, Texas. (Application)

2. Roadrailers are specially designed carriage vehicles which will operate in a rail mode or a highway mode. (Application, Tr. 10). The current Road-Rail units are forty-five foot dry vans, but may eventually include refrigerated and tank units. (Ex. 5, 6, and 9)

3. Road-Rail service between Houston and Ft. Worth/Dallas will be part of a service between Chicago, Ill., and Houston called the South-West Xpress. (Tr. 39; Ex. 7 and 8)

4. An agreement was negotiated between Road-Rail and the Burlington-Northern Railway (BN) whereby Road-Rail would supply the carriage equipment and BN would provide the locomotive power for the South-West Xpress. (Tr. 42; Late Filed Exhibits 3 and 4)

5. Road-Rail proposes to offer three types of service in intermodal movements on both highways and rails:

> PLAN A Movement in Road-Rail equipment owned or leased on a long-term basis by shippers, forwarders or truck lines,
>
> PLAN B Same as A except that the equipment is rented on a daily basis;
>
> PLAN C Door-to-door movement with Road-Rail providing for consolidation, pickup and delivery service between customer's facilities and rail terminals of either origin or destination. (Application)

6. In Finance Docket No. 29898 (Exhibit 12), the ICC reaffirmed that interstate Road-Rail transportation is exempted from ICC regulation under 49 U.S.C. § 10505 pursuant to Ex Parte 230 (Sub-No. 5). *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (Sub-No. 5). In Docket No. 29898, the ICC also concluded that interstate operations under Plan C which would otherwise require motor carrier operation authority are also exempt from ICC regulation under Ex Parte No. 230 (Sub-No. 5).

7. Road-Rail plans to solicit road traffic as far as economics allow, conceivably a distance as far as from Houston to the Harlingen-Brownsville area. (Tr. 88)

8. Road-Rail will experience competition in rail service from highway carriage, both private and common, railroads, and TOFC/COFC movements. The availability of transportation options for rail movements protects shippers from abuse of market power. (Tr. 82)

9. The availability of transportation alternatives make[s] rate regulation of Road-Rail rail service unnecessary to carry out the policy of the Commission as defined at 16 TAC § 5.551 and 49 U.S.C. § 10101a.

10. Road-Rail will comply with all state highway rules and regulations. (Tr. 100)

DISCUSSION

In Ex Parte 230 (Sub.-No. 5), *Improvement of TOFC/COFC Regulation*, 364 ICC 731, (1981) (X-230), the ICC exempted from regulation interstate railroad operations involving TOFC/COFC movements whether conducted on railroad flatcars or trucks that are owned and operated by railroads. As a footnote to that decision, the ICC stated that it intended the exemption to extend to Road-Rail equipment and any other equipment developed for use in intermodal service. The position of the ICC was reaffirmed in Finance Docket No. 29898, *Road-Rail Transportation Company, Inc.—Petition for Exemption* decided August 18, 1982 wherein the ICC held that the operations of Road-Rail are covered by the TOFC/COFC exemption already granted and excluded Road-Rail from reporting and accounting requirements.

In X-230 and Docket No. 29898, the ICC concluded that an exemption was proper because regulation was not necessary to carry out the transportation policy of 49 U.S.C. 10101a and because the exemption would not allow Road-Rail to abuse market power. The ICC believed

that shippers have abundant transportation alternatives such as motor carrier or TOFC/COFC service. The ICC observed that under Plan C, Road-Rail would be providing motor freight or motor carrier service and would ordinarily have to obtain operating authority and file appropriate tariffs as a motor carrier. The ICC concluded, however, that since the service was to be provided by a rail carrier, Road-Rail, the motor carrier service should also be exempt. In this application, Road-Rail seeks an exemption of the same scope as that granted by the Interstate Commerce Commission.

In Docket No. 000149RRMI, decided December 5, 1983, the Railroad Commission of Texas exempted TOFC/COFC intrastate rail movements from regulation. The decision in that docket reserved for determination any exemption regarding Road-Rail movements. The scope of the TOFC/COFC exemption granted did not include an exemption for "incidental pre-rail or ex-rail over-the-road movements." Order, Docket No. 000149RRMI.

Pursuant to 16 TAC § 5.561 the Railroad Commission may exempt a rail transaction or service from regulation when the Commission finds that rate regulation is not necessary to carry out the policy of the Commission and either (1) the transaction or service is of limited scope or (2) rate regulation is not needed to protect shippers from the abuse of market power. Road-Rail urges that rate regulation is not necessary to carry the policy of the Commission or to protect shippers from the abuse of market power because of the availability of transportation alternatives. (Tr. 82).

The examiner concludes that although the railroad movement in Road-Rail equipment may be limited to rail corridors, the scope of the application as proposed is not sufficently limited to ensure the availability of transporta-

tion alternatives.[1] Road-Rail testified that it will solicit ground movement of traffic as far as the economics dictate. Road-Rail envisions solicitation of road traffic to Houston from points as far as Brownsville and the Valley, a distance of over 300 miles. The line-haul movement by rail from Houston to Dallas will be approximately 240 miles (Houston and Dallas are the only scheduled intrastate stops of the South-West Xpress). Accordingly, Road-Rail will be soliciting road transportation at distances greater than it will be moving the traffic by rail. (Tr. 42). In those instances, Road-Rail's primary business will be motor carriage.

Secondly, although Road-Rail's application, and the scope of this proceeding is limited to the South-West Xpress, Road-Rail may seek to institute further movements in the state. (Tr. 96). Any further extensions would require Commission approval, but as of this time the number of potential routes is unknown.[2] Subsequent applications, legally indistinguishable from this one, would logically need to follow the decision rendered here. A grant of a series of motor and rail exemptions could irreparably injure efficient for hire motor carriage in the state.

---

[1] Road-Rail primarily urged that regulation is not necessary to protect shippers from the abuse of market power. The Examiner is of the opinion that based on this record, Road-Rail could not prevail on the alternative ground, that the service is limited in scope, for the same reasons advanced herein.

[2] There was some discussion at the hearing wherein Road-Rail stated its belief that this application would grant a statewide exemption for Road-Rail equipment (Tr. 96). The Examiner believes such a broad exemption is not possible in this proceeding as the scope is limited to the notice issued in Notice No. 8006 which is limited to the movements between Houston and Dallas/Ft. Worth.

Thirdly, it is not clear from the record that "economics" would even restrict Road-Rail movements to joint road-rail movements. Although Road-Rail witnesses testified that economics would dictate that the road movement would need to be tied to a rail movement partially because of the higher cost of Road-Rail equipment, about twice the cost of a conventional forty-five foot van, (Tr. 98-99), the same witness also testified that the cost of road operation of Road-Rail equipment is equivalent to road carriers. (Tr. 60). Conceivably, Road-Rail could solicit additional ground movement between ground movement points at rates somewhat over variable cost but less than Commission set rates in order to optimize the capacity of its vehicles. This carriage could include common carriage in dry vans as well as movements requiring specialized equipment such as refrigerated or tank units.

The Commission must be concerned about the viability of motor carriage for at least two reasons. One, a healthy motor carriage industry is the predicate for this exemption. One of the protections to shippers from the abuse of market power by Road-Rail is the availability of transportation alternatives. Motor common carriage is a major one.

Secondly, pursuant to TEX. REV. CIV. STAT. ANN. art. 911b § 4(d), the Commission is charged to regulate motor carriers "so as to carefully preserve, foster and regulate transportation." An exemption for railroad motor carriage would place the exemption power of the Commission at war with its regulatory duty. Road-Rail has not submitted any authority that would relieve the Commission of its regulatory duty other than the ICC action regarding interstate traffic.

The Examiner's recommendation is also consistent with the decision of the Commission regarding the TOFC/COFC exemption. In Proposal for Decision, the examiner found that TOFC/COFC rail movements are limited in scope and not susceptible to a concentration of

market power because rail transportation alone does not allow the movement of shipments to points off the rail lines. Thus TOFC/COFC rail movements cannot provide the complete pick up, delivery and line-haul service performed by motor carriers. The Examiner stated, "If both the ground and rail movements were exempt then the railroads would be at a competitive advantage over regulated intrastate state motor carrier service." Proposal for Decision, Docket No. 00149RRMI, p. 6. The examiner noted that TOFC/COFC traffic is subject to certain inherent constraints in that rail carriers cannot serve points off rail lines or points which do not have the facilities to accommodate TOFC/COFC traffic.

CONCLUSIONS OF LAW

Applicable Law

The instant proceeding is governed by the provisions of 49 U.S. Code §§ 10505 and 10101a which provide, in pertinent part, that:

> "(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle (1) is not necessary to carry out the transportation policy of section 10101a of this title; and (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power." [§ 10505]

Applicable Rules

This case is also governed by the provisions of 16 TAC § 5.561 (RCT 051.03.30.011) of the Special Rules of Prac-

tice and Procedure in Rail Rate Cases. This rule provides, in pertinent part, that:

> "The Commission may exempt a transaction or service when the Commission finds that rate regulation is not necessary to carry out the policy of the Commission; and either: (1) the transaction or service is of limited scope or (2) rate regulation is not needed to protect shipper from the abuse of market power."

RECOMMENDATION

Accordingly, the examiner recommends that Road-Rail's application be granted in part, and denied in part. The movement of commodities in Road-Rail equipment should be exempted to the extent the movements are conducted by rail. The highway movement of commodities in Road-Rail equipment should not be included within the exemption.

JIM B. CLOUDT

Jim B. Cloudt
Presiding Examiner

JBC/ca

[EXAMINER'S DRAFT ORDER]

RAILROAD COMMISSION OF TEXAS
TRANSPORTATION DIVISION

Docket No. 025806ZZR
RAILROAD FREIGHT CIRCULAR NO.

ROADRAILER EQUIPMENT IN INTERMODAL OPERATIONS INTRASTATE BETWEEN HOUSTON AND DALLAS-FT. WORTH VIA ROAD-RAIL TRANSPORTATION COMPANY, INC. — EXEMPT RAIL SERVICE FROM REGULATION.

FINAL ORDER

In conference at its office in Austin, Texas, the Railroad Commission of Texas finds that after statutory notice was given to the public and to all interested parties, the above-styled cause was heard by an examiner who made and filed a proposal for decision containing the examiner's findings of fact and conclusions of law. This proposal for decision was properly served and all parties were given an opportunity to file exceptions and replies as part of the record herein, under the provisions of 16 TAC § 5.443 (RCT 051.03.50.043).

The Commission, after review and due consideration of the proposal for decision, the findings of fact and conclusions of law contained therein, hereby adopts as its own the findings of fact and conclusions of law contained in the proposal for decision and incorporates said findings of fact and conclusions of law as if fully set out and separately stated herein.

The Commission concludes that the application of Road-Rail Transportation Co., Inc. should be granted in part and denied in part.

Accordingly, it is ordered by the Railroad Commission of Texas that rail traffic moving intrastate in the State of Texas in bimodal (rail or highway) equipment owned and/or operated by Road-Rail Transportation Co., Inc. on a rail route between Houston, and Ft. Worth-Dallas, Texas (excluding intermediate and subsequent points); in conjunction with the Burlington-Northern Railway (such route to be part of an interstate route between Chicago, Ill. and Houston known as the "South-West Xpress") be, and the same is hereby exempted from regulation by the Railroad Commission of Texas. This exemption shall not apply to incidental pre-rail and ex-rail over-the-road movements.

Effective

RAILROAD COMMISSION OF TEXAS

RAILROAD COMMISSION OF TEXAS
TRANSPORTATION DIVISION

Docket No. 025806ZZR
RAILROAD FREIGHT CIRCULAR NO. 35718
DATE ISSUED: February 28, 1984

ROADRAILER EQUIPMENT IN INTERMODAL OPERATIONS INTRASTATE BETWEEN HOUSTON AND DALLAS-FT. WORTH VIA ROAD-RAIL TRANSPORTATION COMPANY, INC.— EXEMPT RAIL SERVICE FROM REGULATION.

FINAL ORDER

In conference at its office in Austin, Texas, the Railroad Commission of Texas finds that after statutory notice was given to the public and to all interested parties, the above-styled cause was heard by an examiner who made and filed a proposal for decision containing the examiner's findings of fact and conclusions of law. This proposal for decision was properly served and all parties were given an opportunity to file exceptions and replies as part of the record herein, under the provisions of 16 TAC § 5.443 (RCT 051.03.50.043).

The Commission, after review and due consideration of the proposal for decision, the findings of fact and conclusions of law contained therein, and exceptions thereto, hereby adopts as its own the findings of fact and conclusions of law contained in the proposal for decision and incorporates said findings of fact and conclusions of law as if fully set out and separately stated herein. Each exception to the proposal for decision is hereby expressly overruled.

The Commission concludes that the Application No. 432 of Road-Rail Transportation Co., Inc. should be granted in part and denied in part.

Accordingly, it is ordered by the Railroad Commission of Texas that rail traffic moving intrastate in the States of Texas in bimodal (rail or highway) equipment owned and/or operated by Road-Rail Transportation Co., Inc. on a rail route between Houston, and Ft. Worth-Dallas, Texas (excluding intermediate and subsequent points); in conjunction with the Burlington-Northern Railway (such to be part of a route between Chicago, Ill. and Houston known as the "South-West Xpress") be, and the same is hereby exempted from regulation by the Railroad Commission of Texas. This exemption shall not apply to incidental pre-rail and ex-rail over-the-road movements.

Effective March 8, 1984.

RAILROAD COMMISSION OF TEXAS

[signed] MACK WALLACE
Chairman

ATTEST:

[signed] BUDDY TEMPLE
Commissioner

LOLA WILSON
Secretary

[signed] JIM NUGENT
Commissioner

JBC/ca

Supreme Court of the United States

No. 85-1222

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

TEXAS, ET AL.

ORDER ALLOWING CERTIORARI. Filed June 2, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. This case is consolidated with 85-1267, *Missouri-Kansas-Texas Railroad Company, et al.* v. *Texas, et al.*, and a total of one hour is allotted for oral argument.

Supreme Court of the United States

No. 85-1267

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL., PETITIONERS

v.

TEXAS , ET AL.

ORDER ALLOWING CERTIORARI. Filed June 2, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. This case is consolidated with 85-1222, *Interstate Commerce Commission* v. *Texas, et al.*, and a total of one hour is allotted for oral argument.

U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/20524